United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1361

Docket No. 76-1361

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA

Appellee

-vs-

ALFRED C. MATHIAS

Appellant

APPEAL FROM A JUDGMENT OF CONVICTION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

CR 74-231

BRIEF OF THE APPELLANT

THIELMAN & LALIME
Attorneys for Appellant
Office & Post Office Address
1710 Liberty Bank Building
Buffalo, New York 14202

INDEX TO BRIEF

	Page No.
PRELIMINARY STATEMENT	1
FACTS	2
ARGUMENTS	6
POINT I	7
POINT II	9
POINT III	10
CONCLUSION	12

TABLE OF CASES

Barger vs Wingo, 407 U. S. 514	7
Berger vs U. S., 395 U. S. 78	11
Glasser vs U. S., 62 S. Ct. 457	11
Hanrahan vs U. S., 348 F 2d 363	8
Latham vs U. S., 226 F 2d 420	11
McDonald vs Wainright, 466 F 2d 1136	11
Petition of Provoo, 350 U. S. 857	8
Phillips vs U. S., 201 F 259	7
U. S. vs Achentenberg, 459 F 2d 91	11
U. S. vs Crow Dog, 344 F Supp. 28	8
U. S. vs Drummond, 481 F 2d 62	11
U. S. vs Kovars, 150 F Supp. 301	8
U. S. vs Spangelet, 258 F 2d 338	11
U. S. vs Taylor, 508 F 2d 761	11
U. S. vs White, 486 F 2d 204	11

76-1361

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA

Plaintiff-Appellee

-vs-

ALFRED C. MATHIAS

Defendant-Appellant

B R I E F

Docket No. 76-1361

STATEMENTS

The Defendant, ALFRED C. MATHIAS, was indicted on August 28th, 1974 (A- 7)[1] for conspiracy to commit offenses against the United States by embezzling and misapplying funds while employed by the City of Buffalo in a federally funded agency, in violation of Title 18, U.S.C., Section 371 (Count 1; willfully and knowingly obtaining money by making a false entry while employed by the City of Buffalo in a federally funded agency, in violation of Title 18, U.S.C., Section 1001) Counts 2, 3, 4 and 5.

After the Defendant was arraigned on September 10th, 1974, discovery motions were made by his attorney within the time allotted by the U. S. Magistrate. JOSEPH LOTT the Co-defendant in this case, pled guilty on October 7th, 1974, to Counts 1 and 7 of the indictment and sentencing was set for November 11th, 1974. On November 18th, 1974, the case of the UNITED STATES vs ALFRED C. MATHIAS was called ready for trial with no further motions by the Defendant and the United States Government.

Subsequent to the plea of guilty by JOSEPH LOTT, the United States Attorney decided that a superseding indictment was necessary and this is affected by District Court no. CR-75-13. On April 15th, 1975, motions were made before the United States Magistrate, Edmund Maxwell to dismiss this superseding indictment and to demand an

immediate trial. At the proceedings before the Magistrate, the Government through the United States Attorney, William Skretny, voluntarily withdrew this superseding indictment, CR-75-13, without argument. Subsequently this case was sent to the Honorable Justice John T. Curtin for trial wherein on May 27th, 1975, additional motions were made for an Order dismissing the indictment for the failure of the Government to bring this case to trial. During all of these motions, the Defendant LOTT'S sentencing was continually adjourned by the United States Attorney. On June 16th, 1975, Judge Curtin denied the dismissal of the indictment for lack of a speedy trial. On August 6th, 1975, the case was again referred to a pre-trial in front of Judge Curtin, and again the Defense Attorney asked for an immediate trial. This motion was again made by letter on November 3rd, 1975. Thr trial commenced on May 11th, 1976.

On May 20th, 1976, the Defendant was found guilty of Counts 1, 2 and 5 with the jury unable to reach a verdict on Counts 3 and 4.

On June 28th, 1976, ALFRED C. MATHIAS, imposition of sentence on Count 1 was suspended and Defendant placed on probation for three years with a fine of $500.00. Similar sentences were given on Counts 2 and 5 to run concurrently with Count 1. This Appeal is from the Judgment of Conviction.

STATEMENT OF FACTS

This case came on for trial on May 11th, 1976. The principal witness against the Defendant, MATHIAS was Co-defendant, JOSEPH LOTT, who testified that he and the Defendant, MATHIAS, worked on the Mayor's 1973 Summer Youth Program and were hired basically at the same time which was some time in July of 1973 (TR-126). On direct examination, JOSEPH LOTT testified that he and MATHIAS discussed some checks that were lying around a desk drawer at 585 Michigan Avenue. There is no mention in the testimony at this time by LOTT, that there was a preconceived plan by them to make these checks

* TR - transcript

amenable. LOTT testified that the Government's exhibit #13 offered in evidence at the trial was a check in the amount of $87.09, plus that ALFRED C. MATHIAS brought it to his attention and it was subsequently cashed by LOTT. JOSEPH LOTT then testified (A-34) that on Government's exhibit #15 he took a check payable to David Tillman and the amount of that check was $43.54. There was no mention on direct examination whether or not he cashed this and split the difference or kept the whole amount for himself. This check was predated and precashed before Government's exhibit #13.

JOSEPH LOTT (A-31a) did admit to taking a check of Marcella King which is the Government's exhibit #21 in evidence. He advised the court that he took and cashed it, placing on it the endorsements necessary for its negotiation. On cross examination (A-40) JOSEPH LOTT admitted to hiring David Tillman, placing him on the time sheet marked in Government's exhibit #10 (A- 37). JOSEPH LOTT also admitted to taking the check of David Tillman, Government's exhibit #15, out of the drawer and not sharing in the proceeds with ALFRED C. MATHIAS. On direct examination, the Defendant, JOSEPH LOTT, admitted to endorsing several of the checks alleged in the indictment and sharing them with the Defendant, MATHIAS. During the course of further direct and cross examination he admitted and emphasized the fact that his meeting was not until after late August of 1973, even though he admitted to taking other checks of other individuals that were not employed by the Program during July and August of that year. LOTT also admitted that this meeting with MATHIAS was after he learned of the misappropriation going on and of being watched.

The next witness that is called by the Government was Charles T. Spitzer, Special Agent of the Federal Bureau of Investigation who testified and was qualified as an expert on handwriting identification. He testified mainly to the effect that the second endorsement bearing the name of ALFRED C. MATHIAS, are those of ALFRED C. MATHIAS

The Defendant duly recognized and stipulated to the effect that he did sign these checks. During cross examination, the witness Spitzer could not identify or even attempt to qualify the signature of any of the exhibits introduced into evidence by the Government for comparison with the handwriting of ALFRED C. MATHIAS.

The next witness by the Government is Marcella King (A 72-100). During her testimony on direct examination, Marcella King admitted to involvement in three checks of which she split the proceeds with ALFRED C. MATHIAS. This was after he had contacted her sometime late in the summer of 1973. She advised that she knew JOSEPH LOTT and also states that she had no dealings with the two other checks that were presented as exhibits by the U. S. Government. At this time, the prosecution's witness, Marcella King, admitted to the fact that she did tell the F B I a different story from what she told on the stand before the jury and that she in fact did tell the Defense Attorney, James L. Lalime, a story similar to that of the F B I. This story told to the agent of the F B I and to Mr. Lalime was false which she admitted on the stand.

On cross examination, Marcella King (93-100) went into further detail on her story that she gave to the Defense Attorney of the fact that she had worked on the Model Cities Program. Marcella King admits (A- 94) how she changed her story that she originally had given to the F B I and Attorney Lalime. She assumed that she gave this information of change of story approximately a year ago to Mr. Skretny of the United States Attorney's Office. She also advises to the fact that there was an F B I agent present during the interview when she changed her story. She changed her story because she had the fear that she might go to jail for purgery. Marcella King also admitted under cross examination that she had no fear that the Government would prosecute her for fraud against the Government.

Concluding the testimony of Marcella King, the Defense Attorney Lalime, asked

the court for a mistrial based on the fact that the Government had failed to produce the prior testimony of Marcella King as required by section 3500 of the Jenks Act Decision (TR-220). Assistant United States Attorney William Skretny at this time, advised the court that there was no additional 3500 material.

Government's witness David Tillman under direct examination advises that he did not work for the Program and did not sign any checks (TR-222). The only thing David Tillman knows is what he disclosed on cross examination, that it could possibly have been JOSEPH LOTT who went to school with him and took the information for the application for the Mayor's Summer Program.

The facts of the rest of the Government's case is primarily insignificant. They introduced the witness from the bank who advises that the Government's exhibits pertaining to ALFRED C. MATHIAS, wherein he deposited them in his checking account, were in fact deposited under the number shown on the endorsement side of each of the checks presented by the prosecution. Again, ALFRED C. MATHIAS, through his attorney, offers no pertinent cross examination other than the stipulation that they in fact were deposited in the account of ALFRED C. MATHIAS as indicated by the prosecution witness.

At the termination of the Government's case, a discussion is held with the court and counsel for the prosecution and defense on the FD 302 submitted by the Government of 3500 material, which appears to be only a partial interview under the F B I standards. There is no date or agent's name attached to this FD 302. There is also discussion concerning when and where the prosecution witness Marcella King, changed her statement and if any written information was taken either by the F B I or the United States Attorney. The United States Attorney in his comments to the court at this particular stage of the trial does state that he does not have any information that he put to writing concerning the change of testimony of Marcella King. The motion for the mistrial by the Defense

Attorney, Mr. Lalim and the additional motion to strike the testimony based on the fairness of the trial by the Government to the defense, were both denied. A motion at this time for a Judgment of Acquittal in view of the fact that the Government had failed to prove the allegations put forth in the indictment was also denied.

The defense puts on several witnesses attesting to the good character and reputation of ALFRED C. MATHIAS during his adult years in Buffalo. The Defendant, MATHIAS also takes the stand wherein he denied any involvement in the misappropriation of these checks or the participation in the taking of these checks with JOSEPH LOTT. His testimony is fully set out in the transcript (TR-374) which is already in the possession of the court.

The motions made on the end of the Government's case were substantially renewed by the Defendant at this time wherein the court denied said motions.

The Government and the defense then sum up to the jury. The defense objects to the prosecution's referral to handwriting specimens on the back of the Government's exhibits that were not testified to by the expert witness from the F B I put on by the prosecution (A-510).

ARGUMENT

1. That the trial court erred in not granting a motion for dismissal of the indictment for want of a speedy trial, in view of the fact that the Defendant was indicted on August 28th, 1974 and was not tried until June of 1976 with substantial prejudice to the Defendant because of this delay.

2. Whether the court should have granted a motion for mistrial based on the unfair conduct of the prosecuting attorney for failure to disclose to the Defendant, a statement given by a prime witness for the prosecution, whose story was diametrically changed from one formerly given to the F B I and the Defense Attorney in their respective investigations.

3. That the conviction of the Defendant, ALFRED C. MATHIAS, should be reversed in view of the improper remarks made by the Assistant United States Attorney during his summation.

POINT I

THE COURT BELOW ERRED AND ABUSED ITS DISCRETION IN NOT DISMISSING THE INDICTMENT FOR WANT OF A SPEEDY TRIAL AS REPEATEDLY REQUESTED IN PRE-TRIAL MOTIONS AND LETTERS BY THE DEFENSE ATTORNEY.

The Supreme Court has affirmed the right to a speedy trial granted to the Defendant under the sixth amendment of the Constitution of the United States and has enunciated a balancing test in which the conduct of both the presecution and the defense are to be weighed. The relevant factors are:

1. Length of delay.
2. Reason for delay.
3. Defendant's insistence upon a speedy trial.
4. The ensuing prejudice to the Defendant.

The concurring opinion in Barker vs Wingo, 407 U. S. 514, suggested that "the mere excuse of a congested court calendar would not suffice in precluding dismissal because the burden of prosecution is on the State and it is the State's duty to provide adequate machinery for same."

There is no question that the Defendant must make timely demands for a speedy trial. See Phillips vs U. S., 201 F 259 at page 262 (A-4.5).

There is a three fold rationale behind the sixth amendment command for a speedy trial:

1. The Defendant should be protected from prolonged preliminary imprisonment.
2. The Defendant should be relieved of the harassing anxiety and public

suspicion of an untried accusation.

3. The means of proving innocence will not be hampered by the fact that witnesses will be available or that their memories will become impaired, Petition of Provoo, affirmed 350 U. S. 857.

The burden of proof was upon the Government to show the accused suffered no serious prejudice beyond that which ensued from ordinary and inevitable delay. If this burden is not met, then the conviction must be vacated and the indictment dismissed. Hanrahan vs U. S., 348 F2d 363 (A- 22) (A- 26).

The court should consider prejudice from loss of evidence or memory of witnesses that might accompany delay and the hardship the Defendant may suffer as a result of the delay. U. S. vs Kovars, 150 F. Supp. 301. This was an approval of dismissal for a seventeen month lapse in prosecution time.

A twenty-five month delay between the indictment and trial was sufficient to trigger consideration of the other balancing factors in determining whether Defendant has been denied the right to a speedy trial. See U. S. vs Crow Dog, 344 F. Supp. 28.

It is clearly pointed out in the court docket in the appendix of this Appeal that the demands for speedy trial were made frequently and continually from the beginning of this case. The allegations were made by motion to dismiss the indictment because of the prejudice that arose during the course of these delays (A- 22). The Government failed to prove beyond a reasonable doubt that there wasn't any prejudices that arose and in fact, the trial itself shows that prejudices did finally arise by the changing of the testimony of Marcella King. (A- 94) (TR-186). The Defendant during the course of this lengthly delay was unable to obtain employment and was barely able to sustain himself with loans from friends and relatives.

POINT II

SHOULD A MOTION FOR A MISTRIAL BEEN GRANTED BY THE COURT FOR THE APPARENT UNFAIR CONDUCT OF THE PROSECUTING ATTORNEY FOR FAILURE TO DISCLOSE TO THE DEFENDANT, A STATEMENT GIVEN BY A PRIME WITNESS FOR THE PROSECUTION WHOSE STORY WAS DIAMETRICALLY CHANGED FROM ONE FORMERLY GIVEN TO THE F B I AND THE DEFENSE ATTORNEY IN THEIR RESPECTIVE INVESTIGATIONS.

The prosecution witness, Marcella King, on her cross examination (A- 94) that she had, in fact told the F B I on its initial investigation that she did work for the Mayor's Summer Program. She in fact told the jury in her cross examination that she in fact had given this same information to the Defense Attorney, James L. Lalime, some two years before, during the course of his investigation on this matter. (A-94). She advised that she informed the prosecutor, William Skretny, approximately a year before, that she had changed her story and now admitted to the fact that MATHIAS told her the original story to tell both her attorney and the F B I (A- 97).

A motion was made for a mistrial at this time which was denied at this time by Judge Curtin (TR-220).

It is the position of the Defendant on the matters revolving around the testimony of Marcella King that her testimony should have been stricken completely. The prosecution has an obligation to every citizen, even if he be a Defendant or otherwise in a criminal case. In instant case, prosecutor Skretny, had full knowledge since at least October 1st, 1975, wherein he subpoenaed Marcella King to his office for an interview pertaining to her testimony (A-97). It was then incumbent upon the prosecutor to ensure every element of a fair trial by notifying the Defense Attorney that such a radical change in testimony would be presented at trial. The prosecution witness did

inform the United States Attorney that she had in fact given a statement to the Defense Attorney of a complete opposite nature. There is no way the Defense Attorney could at that time investigate any further details of the prosecution witness's testimony and in fact did not have all of the 3500 material presented to him as the record clearly shows.

One of the basic tenets of the judicial system is to ensure that the constitutional safeguards of the Defendant are protected. It is apparent from the record that the prosecutor considered the possibilities of winning the case on a dramatic turn of events at trial such as in instant case, rather than disclosing the drastic change before the prosecution witness, Marcella King, took the stand. It is inconceivable that a statement as important as Marcella King's was to the prosecution's case in chief, and that although there was an agent of the F B I present along with an Assistant United States Attorney, no notes were taken of this diametrically opposed statement that would have been at least available on cross examination in accordance with the Jenks Act (TR- 261).

POINT III

THAT THE CONVICTION OF THE DEFENDANT, ALFRED C. MATHIAS SHOULD BE REVERSED IN VIEW OF THE IMPROPER REMARKS MADE BY THE ASSISTANT UNITED STATES ATTORNEY DURING HIS SUMMATION.

The testimony of Special Agent, Charles T. Spitzer, both in direct examination and cross examination by the Defense Attorney, makes no reference to any similarity either by the introduction of his report or in his testimony from the witness stand, that ALFRED C. MATHIAS, had put his name on any of the exhibits before this court in any other form other than as a second endorser and more specifically, in the name of ALFRED C. MATHIAS (A- 61). Mr. Skretny's remarks in summation concerning the slant in

the way MR. MATHIAS dotted his i's and crossed his t's and so forth, were completely out of order and misleading to the jury. Mr. Skretny was testifying at that particular stage of the summation to the facts of his own knowledge and to his own knowledge only. (A-103)Even though he was admonished by the judge at this particular point in the summation, he continued with his own testimony during the summation. Familiar are those rules which characterize such prosecutorial reference as error, and if the reference is highly prejudicial, such as the case at bar, it has to be reversable error. U. S. vs Achtenberg, 459 F 2d 91 at page 98; McDonald vs Wainright, 466 F 2d 1136; U. S. vs Spangelet, 258 F 2d 338. It is very difficult to determine what statements and what evidence affects the minds of a jury. Even if a judge or the court did caution the jury to disregard said remarks, it is questionable whether this could cure this comment. Latham vs U. S., 226 F 2d 420.

"In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true when the scales of justice may be delicately poised between guilt and innocence. Then error which under some circumstances would not be grounds for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." Glasser vs U. S., 62 S. Ct. 457; U. S. vs Taylor, 508 F 2d 761.

The duties of a prosecutor in a criminal trial before a federal bar have been clearly pointed out in the landmark case of Berger vs U. S., 295 U. S. 78. See also U. S. vs Drummond, 481 F 2d 62; U. S. vs White, 486 F 2d 204.

CONCLUSION

For all the reasons set forth above, the conviction shoud be reversed. The system of federal justice has to be protected to avoid the abridgement of any constitutional rights guaranteed of a fair and impartial trial to the accused.

DATED: September 17th, 1976
BUFFALO, NEW YORK

Respectfully submitted,

THIELMAN & LALIME
Attorneys for Defendant-Appellant
1710 Liberty Bank Building
Buffalo, New York 14202
Telephone: (716) 853-4123

AFFIDAVIT OF SERVICE

UNITED STATES COURT OF APPEALS

THE UNITED STATES OF AMERICA

Plaintiff-Appellee

-vs-

ALFRED C. MATHIAS

Defendant-Appellant

State of New York)
County of Erie) SS:
City of Buffalo)

JUDITH M. HALLADAY, being duly sworn deposes and says, that she is over the age of 18 years and is not a party to this action; and that she served the annexed APPENDIX and BRIEF upon the UNITED STATES ATTORNEYS OFFICE, in the following manner:

By depositing in the United States mail, in the City of Buffalo, on September 17th, 1976, a true copy of said papers at 5:30 p.m. on said date.

Judith M Halladay

Sworn to before me this 17th
day of September, 1976.

James L. Lalime

JAMES L. LALIME
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19[illegible]